IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.7614 OF 2003

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Shri Jagannath Tukaram Waikar ...Petitioner

v/s.

Shri. Sakharam Tukaram Waikar
since deceased through legal
representatives Krushnabai
Sakharam Waikar ...Respondents

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Mr.A.V. Anturkar i/b Ms.S.S.Sawant for the Petitioner.

Mr.S.B.Shetye for Respondents Nos.1A to 1C.

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CORAM: D.K.DESHMUKH, J.

DATED: 17TH AUGUST,2005

P.C.:

1. Rule. Returnable forthwith. Heard finally by consent of parties.

2. Following are the admitted facts:-

The present petitioner is the original Defendant. Original Plaintiff was one Sakharam Tukaram Waikar. The suit filed by Sakharam was dismissed by the trial court. The Plaintiff Sakharam filed an appeal on 30th October, 1990. During the pendency of that appeal on 1-1-1999 he died. Present respondents, who are the legal representatives of the deceased Plaintiff, did not take any steps to bring themselves on record as legal representatives of the deceased Plaintiff. As a result the appeal abated in the year 1996 itself. But the appeal court decided the appeal on merits by order dated 10-7-2000. The Appeal court set aside the judgment and decree passed by the trial court and remanded the matter back to the trial court. When the matter was taken up by the trial court, the present Petitioner filed an application before the trial court that it has no jurisdiction to proceed with the trial of the suit because the order of remand made by the appeal court is a nullity in the eyes of law, because it has been made in an appeal which was already abated. The trial court, however, rejected that application and allowed the application made by the legal representatives of the deceased Plaintiff to be brought on record and decided to proceed with the trial. It is this order of the trial court which is impugned in this

petition.

3. The submission of the learned counsel appearing for the Petitioner relying on the judgment of the Supreme Court in the case of Ambabai and ors. v/s. Gopal and ors, (2001) 5 SCC 570 is that the order of the appellate court dated 10-7-2000 is a nullity in the eyes of law, because it was made in an appeal which did not exist, as it had already abated, as a result of the death of the original Plaintiff/Appellant and inability of the present Respondents to bring themselves on record as legal representatives of the deceased Plaintiff, and as the trial court gets the jurisdiction to resume the trial of the suit because of the remand order passed by the appeal court, the trial court has no jurisdiction to deal with the suit now as the remand order is a nullity.

4. On behalf of the Respondents, on the other hand, it is submitted that because the appeal is continuation of the suit, the trial court was entitled to permit bringing legal representatives of the deceased Plaintiff on record and proceed with the trial of the suit.

5. If in the light of the admitted position noted above, the record of the case is perused, it becomes clear that on 10-7-2000 when the appellate court made the order of remand, there was no appeal pending

before the appellate court and therefore, obviously the order passed by the appellate court was invalid, illegal and null and void. The trial court gets the jurisdiction only because of the remand order. Had there been no remand order, the trial court would not have the jurisdiction to deal with the suit, because so far as the trial court is concerned, the suit was disposed of by its judgment. The trial court gets the jurisdiction to retry the suit only because of the remand order and if the remand order is a nullity in the eyes of law, then the trial court did not get the jurisdiction. If the trial court does not have the jurisdiction to deal with the suit, it also does not have jurisdiction to permit the legal representatives of the deceased Plaintiff being brought on record. The order of the trial court, therefore, is clearly without jurisdiction. It was contended before me that if according to the Petitioner the decree of the appellate court was a nullity, it was for the Petitioner to challenge that decree. He could not have made an application before the trial court not to proceed with the trial. In my opinion, the submission is not well conceived for two reasons; (i) if the Petitioner is right in submitting that the order passed by the appellate court is a nullity in the eyes of law, then the settled position is that the order which is nullity in the eyes of law need not be subjected to direct challenge, but can be collaterally challenged, and (ii) the Petitioner has filed this petition under the

supervisory jurisdiction of this and therefore if this court finds that the subordinate court is acting beyond its jurisdiction, then this court possess the power to make appropriate orders to keep the subordinate court within its jurisdiction by setting aside the orders made by the subordinate court beyond its jurisdiction.

6. Taking overall view of the matter, therefore, in my opinion, the petition deserves to be allowed.

7. In the result, therefore, petition succeeds and is allowed. Rule is made absolute in terms of prayer clause (a). No order as to costs.

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